

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-88 (16)S
Sales Tax
February 22, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S871001A

On October 1, 1987, a Petition for Advisory Opinion was received from West Central Environmental Corp., P.O. Box 83, Rensselaer, New York 12144.

Petitioner raises two issues: I) Should Petitioner charge its customers sales tax on the cost of transporting hazardous waste material to an approved disposal site; and II) should Petitioner be required to pay sales tax on purchases of materials and supplies used to perform its services.

Petitioner is in the business of cleaning up hazardous waste and transporting the waste to approved disposal sites. When Petitioner does a cleaning and disposal, it bills the customer for the time of labor and equipment and all materials and supplies (special gloves, clothes, etc.) used to perform its service. Petitioner charges its customers separately for freight from the cleaning site to the disposal site.

It is Petitioner's contention that it is performing a time and materials contract and the materials and supplies used in the job are actually sold to Petitioner's customer and, therefore, Petitioner is purchasing them for resale. Petitioner also contends that its charges for freight are exempt from sales tax pursuant to § 1101(b)(3) of the Tax Law which excludes from the sales tax the cost of transporting tangible personal property sold at retail where such cost is separately stated in a written contract, if any, and on the bill rendered to the purchaser.

Issue I

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from the services of "maintaining, servicing or repairing real property" Section 527.7(b)(4) of the sales and use tax regulations provides that "[t]he imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable. Section 527.7(b)(2) of the Sales and Use Tax Regulations further explains that: "All services of trash, garbage or debris removal are taxable, whether from inside or outside of a building, a construction site or vacant land." 20 NYCRR 527.7.

Petitioner has furnished no information which would indicate that its service of cleaning up hazardous waste and transporting it to approved disposal sites does not constitute the services of trash removal, the receipts from which are subject to tax pursuant to § 1105(c)(5) of the Tax Law. See: Cecos International, Inc. v State Tax Commission, 126 AD2d 884, 511 NYS2d 174 (1987).

The taxable receipts from the service of trash removal include that component denominated transportation charges. The term "receipt" is defined as "the amount of the charge for any [taxable] service" and includes all of the components of such charge, including expenses for transportation. Tax Law, § 1101(b)(3). Accordingly, it is concluded that the transportation charges in question are subject to sales and use tax. The exclusion contained in section 1101(b)(3) for the cost of transporting tangible personal property sold at retail does not apply to taxable receipts from trash removal.

Issue II

Section 526.6 of the Sales Tax Regulations provides:

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths and sandpaper, even though of limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

Since Petitioner is selling a service subject to tax under section 1105(c)(5) of the Tax Law, it may purchase for resale those services which become a component part of the taxable service. Moreover, Petitioner may purchase tangible personal property tax free if such tangible personal property will become a physical component part of the property upon which the taxable services are performed or will actually be transferred to the purchaser of the taxable

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service in conjunction with the performance of the taxable service. However, if such tangible personal property is actually consumed by Petitioner in the performance of a taxable service and not actually transferred to the purchaser of the service in conjunction with the performance of the service, such tangible personal property is subject to tax.

Whether the materials and supplies here at issue are resold by Petitioner to its customers or consumed by Petitioner itself in performing a service and not actually transferred to the purchaser of the service in conjunction with the performance of the service is a question of fact which is not susceptible to resolution within the content of an advisory opinion. Inasmuch as this question of fact has arisen within the context of an audit, it must be resolved within such context in accordance with the regulations and explanation given above.

DATED: February 22, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.